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No. 16-349

IN THE
Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, and PAULETTE HOUSE

Petitioners,

v.

SANTANDER CONSUMER USA INC., COMMERCIAL RECOVERY SYSTEMS, INC., AND NCB MANAGEMENT SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA) regulates the conduct of "debt collectors." The relevant definition of that term here includes any person who "regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added). A "creditor," by contrast, is any person "who offers or extends credit creating a debt or *to whom a debt is owed*." § 1692a(4) (emphasis added).

In this case, Respondent Santander Consumer USA Inc., a full-service consumer-finance company, purchased $3.55 billion in receivables. A fraction of that purchase involved debt in default, including Petitioners' motor-vehicle loans. Santander then attempted to collect those debts for its own account.

The question presented is whether a full-service consumer-finance company that purchases and then seeks to collect debt in default for its own account is subject to the FDCPA as a "debt collector" that regularly collects or attempts to collect "debts owed or due or asserted to be owed or due another." § 1692a(6).

CORPORATE DISCLOSURE STATEMENT

Respondent Santander Consumer USA Inc. is owned in whole by Santander Consumer USA Holdings Inc., which is a publicly traded entity. Santander Consumer USA Holdings Inc. is owned in part by Santander Holdings USA, Inc.

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INTRODUCTION

The Fair Debt Collection Practices Act (FDCPA or the Act), 15 U.S.C. §§ 1692-1692p, regulates debt collectors. It is undisputed here that Respondent Santander Consumer USA Inc. owned Petitioners' debts at the time it sought to collect them. Petitioners' sole contention is that Santander was nevertheless collecting or attempting to collect "debts owed or due or asserted to be owed or due *another*," bringing it within the FDCPA's definition of "debt collector." § 1692a(6) (emphasis added). Petitioners' argument amounts to a complex work-around to avoid the import of the word "another."

Unanimous panels of the only two courts of appeals that have directly addressed this argument have agreed that it is wrong. In the summer of 2015, the Eleventh Circuit recognized that the argument could succeed "only if we rewrite the statutory text." *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1315 (11th Cir. 2015) (adding that "the statutory text is entirely transparent").

The Fourth Circuit reached the same conclusion in this case. Pet. App. 8a (citing the "plain language" of § 1692a(6)). As that court explained, Petitioners' position rests on an inference that Santander meets the definition of "debt collector" because one of the many *exclusions* from that definition does not apply. Pet. App. 15a. That theory, the court said, represents "upside-down logic that relies on an inaccurate premise and a negative pregnant that does not follow." *Id.*

No court of appeals has faced similar facts and rejected the reasoning adopted by the Eleventh Circuit in *Davidson* and the Fourth Circuit in this case. The older cases Petitioners cite to conjure a circuit split were argued or decided on different grounds or do not otherwise control future cases. *E.g.*, *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007) (involving a different definition of "debt collector"); *Bridge v. Ocwen Fed. Bank*, 681 F.3d 355 (6th Cir. 2012) (holding that plaintiffs pleaded that another entity held the debt).

Equally important, this case is a poor vehicle for addressing the question presented. The FDCPA specifically defines "creditor." § 1692a(4). Here, the district court found that Santander qualified under that definition in part because of a factual concession on Petitioners' part. Consequently, even if this Court were to accept Petitioners' argument that Santander meets the definition of "debt collector," the decision would not be dispositive. For a ruling in favor of Petitioners to change the outcome, the Court would have to decide a tangential question about the ultimate classification of a party that fits within the definitions of *both* "creditor" and "debt collector."

Moreover, this case does not involve any issue of substantial national importance. Petitioners first contend that the supposed circuit split harms the debt-buying industry by allowing different regulatory regimes to coexist across the country. But Petitioners are in no position to speak to the interests of debt purchasers, and state-specific statutes establish an enormous patchwork of law in this area anyway.

Petitioners next discuss a few examples of debt purchasers behaving badly and posit that a parade of horribles could follow. But the Court need not take up this case to stem the abuses to which Petitioners point. Their argument fails to differentiate between companies whose principal purpose is debt collection—where an entirely different definition of "debt collector" under the FDCPA applies—and full-service consumer-finance companies like Santander and the large commercial banks involved in similar cases. Common sense dictates that the latter companies have strong incentives to cultivate their standing in the community and are thus less likely to commit abusive practices. The legislative history describes this line of logic by Congress in passing the FDCPA.

This Court should deny the Petition.

STATEMENT OF THE CASE

As the Complaint alleges, each Petitioner obtained a loan from CitiFinancial Auto to finance a motor-vehicle purchase and later defaulted. Pet. App. 5a. CitiFinancial Auto repossessed and sold Petitioners' vehicles, leaving a deficiency on their accounts. *Id.* On December 1, 2011, Santander purchased Petitioners' accounts from CitiFinancial Auto as part of a larger $3.55 billion package of receivables. *Id.*

The Complaint does not address the details of the purchase. Petitioners now suggest that Santander bought this debt in default and for "pennies on the dollar." Pet. 5. But as Santander has pointed out, most of the loan accounts were not in default when

purchased. Brief of Appellee at 56, *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131 (4th Cir. 2016) (No. 15-1187), 2015 WL 4932610, at *56 ("Far from being a purchase of defaulted debt for pennies on the dollar—as Plaintiffs intimate, but carefully do not directly allege—that transaction consisted of purchasing a portfolio of auto loan accounts valued at over $3 billion, most of which were not in default."). After purchasing the loans, Santander began attempting to collect them. Pet. App. 5a.

Petitioners filed a putative class action in November 2012, alleging violations of the FDCPA. Pet App. 5a-6a. Santander moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the ground that it is not a debt collector under the Act. Pet. App. 26a-35a. The district court granted the motion to dismiss. Pet. App. 40a.

The FDCPA generally regulates debt collectors, not creditors. The Act defines "debt collector" to include three groups: (1) any person who "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," (2) any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," and (3) any creditor who, "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." § 1692a(6). The Act defines "creditor," by contrast, as any person "who offers or extends credit creating a debt or to whom a debt is owed." § 1692a(4).

As Petitioners have conceded, "Santander issues and services tens of thousands of car loans each year." Plaintiffs' Opposition to Defendant Santander Consumer USA Inc.'s Motion to Dismiss the Complaint at 15 n.6, *Henson v. Santander Consumer USA, Inc.*, Civ. A. No. RDB-12-3519, 2014 WL 1806915 (D. Md. May 6, 2014), ECF No. 15 (hereinafter "Pls.' Opp'n"). "[T]here is no plausible allegation," the district court thus held, "that Santander's primary business purpose is the collection of debts" under the first definition of "debt collector," Pet. App. 28a—belying the Petition's statements that Santander is "in the business of purchasing defaulted debt," Pet. i, 5.

The district court then held that Santander did not qualify under the second definition of "debt collector" because it did not "regularly collect[] or attempt[] to collect . . . debts owed or due another," § 1692a(6). Pet. App. 28a. Petitioners' contrary argument, the court made clear, rested on two faulty premises. *See* Pet. App. 28a-29a & nn.2-3. The first was that the word "another" in § 1692a(6) attaches only to debts "asserted to be owed or due," not to debts "owed or due." The second was a negative implication from § 1692a(6)(F)(iii), which excludes from the definition of "debt collector" any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." The district court rejected these arguments because Santander is the entity "to whom a debt is owed," among other things, and therefore meets the definition of "creditor" at § 1692a(4). Pet. App. 30a.

For two independent reasons, the district court rejected the proposition that Santander is not a creditor by virtue of the so-called "assignee exclusion." That provision excludes from the definition of "creditor" any person "to the extent that he receives an assignment or transfer of a debt in default *solely for the purpose of facilitating collection of such debt for another*." § 1692a(4) (emphasis added).

First and foremost, the district court made clear, Petitioners waived reliance on the assignee exclusion. Indeed, they declined to argue that Santander did not fit within the definition of "creditor" at all. Pet. App. 29a n.4 ("Plaintiffs do not expressly rely on the assignee exc[lusion] . . . .") (citing Pls.' Opp'n 10 (conceding that "a non-originating debt buyer that purchases debt in default is not specifically excluded from the definition of 'creditor' because the non-originating debt buyer already falls under the definition of 'debt collector'")). The court emphasized that it could "not ignore [this] failure." Pet. App. 33a.

Second, the district court concluded, "there is no indication that Santander acquired the debt 'solely for the purpose of collection' as opposed to servicing." Pet. App. 33a. To the contrary, the court found, Petitioners conceded that their debts were "'*acquired by Santander for servicing*.'" *Id.* (emphasis in original) (quoting Pls.' Opp'n 15). In sum, the court held, Santander qualifies as a creditor under the FDCPA in part because of a factual concession.[1]

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[1] Petitioners obtained a final judgment under Federal Rule of Civil Procedure 54(b). *Henson v. Santander Consumer USA, Inc.*,

The Fourth Circuit affirmed in a unanimous opinion by Judge Niemeyer. Pet. App. 2a. On appeal, Petitioners argued that the determining factor separating a creditor from a debt collector is whether the entity acquired the debt before or after default. Pet. App. 7a. They thus took the entirely new approach of contending that Santander is not a creditor and therefore must be a debt collector because of the assignee exclusion, a conclusion supposedly fortified by § 1692a(6)(F)(iii). Pet. App. 7a-8a.

This argument, the Fourth Circuit held, "contains several interpretational and logical flaws" and "ultimately stands in tension with [the FDCPA's] plain language." Pet. App. 8a. In sum:

> When arguing from the definition of *creditor*, [Petitioners] overlook the fact that the [assignee] exclusion applies only to a person who receives defaulted debt 'solely for the purpose of facilitating collection . . . *for another*.' Similarly, in relying on the exclusion in § 1692a(6)(F)(iii), they fail to address whether Santander fits under any definition of 'debt collector' before addressing whether the . . . exclusion applies.

Id. (internal citation omitted; emphasis in original).

Civ. A. No. RDB-12-3519, 2015 WL 433475, at *5-6 (D. Md. Feb. 2, 2015).

The Fourth Circuit thus concluded that "the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition." *Id.* Rather, "[t]hat determination is ordinarily based on whether a person collects debt *on behalf of another* or *for its own account*, the main exception being when the 'principal purpose' of the person's business is to collect debt." *Id.* (emphasis in original). Santander, the court held, was "not a person collecting a debt *on behalf of another*, so as to qualify as a debt collector under the second definition, but *on behalf of itself*, making it a creditor." Pet. App. 14a (emphasis in original).

The Fourth Circuit also rejected Petitioners' fallback arguments. First, as relevant here, Petitioners again contended that "another" attaches only to the latter portion of the phrase "debts owed or due or asserted to be owed or due another" in the second definition of "debt collector." § 1692a(6). The court explained that "[w]hile Congress did break up the definition of debt collector in § 1692a(6), defining several distinct classes of persons who qualify . . . , it did not divide the 'regularly collects' phrase." Pet. App. 17a. As written, "the word 'another' modifies both 'owed or due' and 'asserted to be owed or due,' so that the phrase defines a debt collector as including a person who collects debt due another *or* asserted to be due another." *Id.* (emphasis in original).

Second, Petitioners argued that "owed or due . . . another" is ambiguous, such that it could refer to the time when debts were first incurred or the time of the collection activity in question. The court responded that "[i]nsofar as Congress was regulating debt-

collector conduct, defining the term 'debt collector' to include a person who regularly collects debts owed to another, it had to be referring to debts as they existed *at the time of the conduct* that is subject to regulation." Pet. App. 17a-18a (emphasis in original).

The Fourth Circuit denied a petition for rehearing en banc. Pet. App. 41a-42a.

REASONS FOR DENYING THE WRIT

Nothing about this case justifies granting cert. The question presented is narrow, concerning just one of three definitions of "debt collector." Both circuits that have thoroughly analyzed the arguments made by Petitioners here have rejected them for sound reasons rooted firmly in the text of the FDCPA. No other court of appeals has yet considered those decisions, let alone disagreed with them. Moreover, a significant vehicle problem wrought by a factual concession renders this case especially unsuitable for further review.

The problems with the Petition begin with the question presented. Petitioners state the question at a level of generality that has little to do with the decision below. This, in turn, creates the false appearance of a deep circuit split with dramatic public-policy implications.

As outlined above, the FDCPA generally regulates debt collectors, not creditors. The Act assigns each of these categories a threshold definition and then excludes specific persons from those definitions.

On the one hand, a "debt collector" is (1) any person who "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," (2) any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," or (3) any creditor who, "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." § 1692a(6). The Act excludes from the definition of "debt collector," however, any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." § 1692a(6)(F)(iii).

On the other hand, a "creditor" is any person who "offers or extends credit creating a debt or to whom a debt is owed." § 1692a(4). But the Act excludes from this definition any person "to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Id.*

The main flaw in Petitioners' framing of the case stems from a refusal to differentiate between the three definitions of "debt collector." *See* Pet. i (stating the question presented as "[w]hether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a 'debt collector' subject to the [FDCPA]"). This case turns on only the second definition of "debt collector"—which covers any person who "regularly collects or attempts to collect . . .

debts owed or due or asserted to be owed or due another," § 1692a(6). Focusing on the actual statutory phrase in question makes the distortions underlying Petitioners' arguments clear.

I. Lower courts are not in conflict over the question presented.

Petitioners' statement that the Fourth Circuit "documented" a "deep, mature circuit conflict," Pet. 10, is quite a reach. This assertion rests on a single "*[b]ut see*" citation that includes no elaboration whatsoever. *See* Pet. 8, 18 (citing Pet. App. 12a). To the extent there is tension among lower courts, there is no "deep, mature circuit conflict." The Fourth Circuit did not say otherwise.

As for the supposed split: beyond the Fourth Circuit, the only other court of appeals that has fully considered the actual question presented here holds that the FDCPA's second definition of "debt collector" does not apply. The ostensibly contradictory decisions to which the Petition points are distinguishable or would otherwise not control a future case presenting this question. In any event, a robust trend demonstrates that lower courts are resolving any tension in favor of the Fourth Circuit's approach below.

A. The only other court of appeals that has fully considered the question presented agrees with the Fourth Circuit.

The Eleventh Circuit is the only other court of appeals that has fully considered the actual question presented in this case: whether a full-service

consumer-finance company that purchases and then seeks to collect debt in default for its own account can qualify as a "debt collector" under the FDCPA's second definition. And like the decision below, the Eleventh Circuit unanimously said no.

In *Davidson*, Capital One treated the plaintiff's credit-card account as in default at the time of acquisition. Relying primarily on the § 1692a(6)(F)(iii) exclusion, the plaintiff argued that "the line between creditors and debt collectors is drawn by the default status of the debt." 797 F.3d at 1314. That argument, the Eleventh Circuit responded, "effectively urges us to ignore" the Act's definition of "debt collector." *Id.* at 1315. "In contrast to the exclusion at § 1692a(6)(F)(iii)," the court explained, "the statutory definition of 'debt collector' applies without regard to the default status of the underlying debt." *Id.* at 1314. In other words, § 1692a(6)(F)(iii) "is an exclusion; it is not a trap door." *Id.* at 1315.

Moreover, the Eleventh Circuit continued, the plaintiff misplaced reliance on § 1692a(6)(F)(iii) for an additional reason. That exclusion applies only to any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due *another*," § 1692a(6)(F)(iii) (emphasis added), and thus does not encompass a party seeking to collect a debt "owed or due to *him*," like Capital One. *Davidson*, 797 F.3d at 1315 n.6 (emphasis in original).

That misunderstanding, the Eleventh Circuit explained, also infected the plaintiff's interpretation of the same language in the second definition of "debt collector" at § 1692a(6) (emphasis added). *Id.* at 1315.

In effect, the court said, the plaintiff urged it to rewrite that definition to apply to any entity that seeks to collect debts "*originally* owed or due or originally asserted to be owed or due another." *Id.* (emphasis in original). "But," the court rejoined, "we are not in the business of rewriting statutes." *Id.* "The statutory text is entirely transparent," the court concluded. *Id.* "[T]here is no ambiguity in the words that Congress chose to employ." *Id.* at 1316. "Owed or due . . . another" means owed or due another.

Davidson is both correct and consistent with the Fourth Circuit's decision below.

The Ninth Circuit has also issued an opinion along the same lines. In *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013), a mortgage originator assigned the plaintiffs' loan to Wells Fargo, which attempted to collect. The court explained that to declare Wells Fargo a "debt collector" under the FDCPA's second definition "would require us to overlook the word 'another'" in that provision. *Id.* at 1209. "The complaint makes no factual allegations from which we could plausibly infer that Wells Fargo regularly collects debts owed to someone other than Wells Fargo." *Id.* Moreover, the court continued, the statute cannot bear an interpretation whereby "'owed or due another' means 'originally owed or due another.'" *Id.*

The analysis in *Schlegel* did not discuss the default status of the debt at the time of acquisition. The Ninth Circuit's reasoning, however, strongly accords with the approach of the Fourth and Eleventh Circuits.

B. The supposedly contradictory decisions do not control the question presented.

The Third, Sixth, and Seventh Circuit cases to which the Petition points are not in any real conflict with the decision below.

To begin, the Third Circuit case of *Check Investors* turned on the Act's *first* definition of "debt collector," which applies where a business has the "principal purpose" of collecting debts, § 1692a(6). 502 F.3d at 174 (stating that Check Investors "is in business to . . . acquire seriously defaulted debt"); *id.* at 172 ("[T]here is no question that the 'principal purpose' of NTF's business is the 'collection of any debts' . . . . This is equally true of . . . Check Investors." (internal quotation marks omitted)).

The present case, by contrast, turns on the Act's *second* definition of "debt collector"—any person "who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another," § 1692a(6). At base, the parties here dispute—and the Fourth Circuit decided—what it means for a debt to be "owed or due . . . another." That question does not arise under the first definition, which applies where a business has the principal purpose of collecting "any debts," full stop, regardless of to whom they are owed or due.

Nor does the Sixth Circuit's *Bridge* decision reflect any conflict warranting additional attention. There, defendant Deutsche Bank argued that "it was exempt from the FDCPA because, as the purchaser of the debt, it is a creditor and not a debt collector." 681

F.3d at 357. But the complaint alleged that "there is no assignment of record to establish" that Deutsche had actually purchased the debt. *Id.* at 360; *see also id.* at 357.

In other words, the *Bridge* plaintiffs adequately pleaded that the debt was owed or due "another" at the time of collection in the ordinary sense of that term. *See Davidson v. Capital One Bank (USA), N.A.*, 44 F. Supp. 3d 1230, 1239 n.12 (N.D. Ga. 2014) (distinguishing *Bridge* on this ground), *aff'd*, 797 F.3d 1309 (11th Cir. 2015). By contrast, here, Santander undertook collection activities "*on behalf of itself.*" Pet. App. 14a (emphasis in original).

Moreover, *Bridge* noted that the defendants might also qualify as "debt collectors" under the FDCPA's third definition (regarding use of another name, § 1692a(6)) because they employed a law firm to threaten foreclosure. 681 F.3d at 360; *see also id.* at 357. *Bridge*, therefore, is doubly inapposite to the question presented in this case.

Seventh Circuit precedent likewise creates no conflict meriting this Court's involvement. The earliest case to which Petitioners point, *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003), turned on an entirely different issue than the one here. *Schlosser* identified "the question posed" as whether "mistaken assertions and collection activity" by the defendant, Fairbanks, "have any relevance to the application of the [§ 1692a(6)(F)(iii)] exclusion" or whether "it depend[s] only on the actual status of the loan when it was acquired." *Id.* at 537. In other words, Fairbanks argued that it was "not a debt collector

because the Schlossers' loan was not *actually* in default when Fairbanks acquired it." *Id.* at 536 (emphasis added).

Nothing in *Schlosser* suggests that the court considered—much less decided—the separate question of whether an assignee can be a "debt collector" under the second definition where it seeks to collect debt owed or due itself rather than owed or due another. In fact, much of the opinion suggests that the court did *not* consider this issue: from the statement of "the question posed," *id.* at 537, to the remark that Fairbanks "rel[ied] exclusively" on the § 1692a(6)(F)(iii) argument, *id.* at 539, to the stark omission of the word "another" when reciting the statutory text, *id.* at 538 (stating that "'such activity'" in § 1692a(6)(F) refers to "'collecting or attempting to collect any debt owed or due or asserted to be owed or due,'" period).

Indeed, Seventh Circuit judges disagree about whether *Schlosser* should be viewed as taking any position on the "owed or due . . . another" language in the second definition of "debt collector." In *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008), Judge Manion wrote separately to explain that "the question of whether Fairbanks was a debt collector despite not attempting to collect the debt 'for another' never came up in *Schlosser*. . . . That issue was outside the scope of what this court . . . was addressing, and we did not consider it." *Id.* at 506 (Manion, J., concurring in part and concurring in the judgment).

McKinney held that the defendant's conduct did not violate the FDCPA. The court, therefore, did not need to address whether the defendant was a debt collector. *Id.* at 507. Nevertheless, the majority opinion did address that issue, mistakenly relying on *Schlosser*. *See id.* at 502 (majority op.) (stating that "under *Schlosser*, an agency in the business of acquiring and collecting on defaulted debts originated by another is a debt collector under the FDCPA even though it actually may be collecting for itself").

Most recently, in *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009), the court repeated that a buyer of defaulted debt should be considered a debt collector. *Id.* at 796. But in that case, defendant Triumph Partnerships argued it was not a debt collector because it hired others to collect the debts for it. *Id.* In rejecting this argument, the Seventh Circuit never addressed whether Triumph fell under the first or second definition of "debt collector" and thus never grappled with the "owed or due . . . another" language in the latter. *See id.* at 796 (reciting both definitions); *id.* at 793 (describing Triumph as "a company that purchases defaulted debts and attempts to recover them," suggesting it may have qualified under the first definition).

The Seventh Circuit's crooked chain of decisions does not make a cert-worthy split. As an initial matter, where "the issue addressed in [a] passage [found in a previous opinion] was not presented as an issue, hence was not refined by the fires of adversary presentation," a later court "is free to reject" that passage as dictum. *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988). This rule applies to the *Schlosser* and *Ruth*

language on which Petitioners rely. That is, the parties in those cases did not address the question presented here but, instead, argued other issues not directly pertinent to the court's comments about the default status of debt.

More fundamentally, the Seventh Circuit has never fully considered the question presented here. *Schlosser* ignored it, and *McKinney* short-circuited it. Fortunately, that failure is readily remediable. Seventh Circuit panels "are not absolutely bound" by prior panel pronouncements. *United States v. Reyes-Hernandez*, 624 F.3d 405, 412-13 (7th Cir. 2010). Instead, they "must give fair consideration to any *substantial* argument that a litigant makes for overruling a previous decision." *Id.* (emphasis in original). To the extent necessary, and in addition to the reasons below, the fact that *McKinney* rested on an obvious misunderstanding of *Schlosser* provides a substantial argument for overruling it. This Court should not and need not grant cert to correct the Seventh Circuit's misunderstanding of its own precedent. The Seventh Circuit can do so itself, even without en banc intervention.

Finally, Petitioners assert in a cursory manner that the Fifth Circuit and the D.C. Court of Appeals have issued rulings that conflict with the decision below. They are wrong.

In *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), the debt was not in default at the time of acquisition. *Id.* at 1208. And in context, there can be little doubt that the court's comment on default status simply summarizes the legislative history that it cites,

which, as relevant, concerns only servicing companies.[2]

In *Logan v. LaSalle Bank National Association*, 80 A.3d 1014 (D.C. 2013), the plaintiff failed to plead that the defendants met any aspect of the provision defining "debt collector." The court held that "appellant has not pleaded sufficient facts to support an inference regarding appellees' status as debt collectors under the Act" because "[t]he complaint includes no facts explaining [the relationship between the defendant entities], when either entity acquired an interest in the loan, the nature of that interest, or whether appellant was in default when it did so." *Id.* at 1021-22. The decision thus did not turn on the question presented here.

At bottom, there is no well-developed disagreement among lower courts that would merit this Court's further consideration.

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[2] *Compare* S. Rep. No. 95-382, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 ("[T]he committee does not intend the definition [of "debt collector"] to cover . . . the collection of debts, such as mortgages and student loans, by persons who originated such loans . . . [or] mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing . . . ."), *with Perry*, 756 F.2d at 1208 ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." (citing S. Rep. No. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698)).

C. The timeline of decisions shows a trend favoring the approach below.

The timeline of the court of appeals decisions discussed in the Petition further reflects that there is no need for this Court's intervention. The handful of decisions Petitioners address at any length to support their view predate *all* of the decisions they admit support Santander's.

On the one hand: *Schlosser*, the Seventh Circuit case that had nothing to do with the question presented, came down in 2003, and its dubious progeny, *McKinney* and *Ruth*, date back to 2008 and 2009, respectively. The Third Circuit published *Check Investors* in 2007, and the Sixth Circuit, *Bridge* in 2012.

On the other hand: The Ninth Circuit issued *Schlegel* in 2013; the Eleventh Circuit issued *Davidson* in 2015; and the Fourth Circuit issued the decision here in 2016.

Thus, to the extent any conflict ever existed, it is fading away. All federal appellate courts that have considered the issue after 2012—and all that have fully evaluated Petitioners' various contentions—have agreed that a full-service consumer-finance company that purchases and then seeks to collect debt in default for its own account does not qualify as a "debt collector" under the second definition in the FDCPA. *Davidson*, from the summer of 2015, is the leading light in this area, and it has not drawn a word of disagreement. And each court with an older, purportedly differing decision on its books can

distinguish or overrule it, even absent en banc involvement.

II. This case is a poor vehicle for addressing the question presented.

This case suffers from a notable vehicle problem. The actual question presented here is whether Santander meets the second definition of "debt collector" in § 1692a(6). But even if Petitioners were to prevail on this issue, they would face another hurdle. At the district court, Petitioners conceded that Santander met the definition of "creditor." And they did so on factual grounds unrelated to any argument pressed here. This Court, therefore, could not issue a dispositive ruling in their favor simply by answering the question presented.

To provide more detail: Santander was obviously a person "to whom a debt is owed"—the threshold definition of "creditor" at § 1692a(4). Plaintiffs attempting to show that debt purchasers do not meet that definition normally point to the assignee exclusion. That is, they assert that debt purchasers are not "creditors" because they "receive[d] an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." § 1692a(4).

Petitioners, however, never made this argument before the district court—a "failure" the court said it could "not ignore." Pet. App. 33a. Even beyond that, the court said, there is "no indication" in the Complaint "that Santander acquired the debt 'solely for the purpose of collection.'" Pet. App. 33a. To the contrary, Petitioners conceded their debts were

"'*acquired by Santander for servicing*.'" Pet. App. 33a (emphasis in original) (quoting Pls.' Opp'n 15); *see also* Pet. App. 16a (pointing out that Petitioners attempted to replead facts relating to the assignee exclusion on appeal: "[T]he facts that the plaintiffs presume in their brief [to the Fourth Circuit] are not the facts of their complaint.").

Put differently, while Petitioners argue that Santander is a debt collector, they have also conceded as a factual matter unrelated to any argument before this Court that Santander is a creditor. This unusual wrinkle means this Court could not render a dispositive ruling for Petitioners on the question presented without facing a murky follow-up question about the proper classification of a party that is both a creditor and a debt collector.

This obstacle should preclude further review. To the extent the Court wants to address whether purchasers of debt in default are debt collectors under the FDCPA, it can and should await a case posing that issue as a clean legal question.

III. This case presents no issue of substantial national importance.

Petitioners offer two arguments that this case could have significant policy consequences. Neither withstands scrutiny.

First, Petitioners invoke a parade of horribles regarding abusive debt-collection practices that the decision below allegedly abets. They fail to show, however, that this has anything to do with the

FDCPA's second definition of "debt collector"—the only definition of that term in question here.

To be specific: Petitioners discuss "debt buyers" as a unified whole. Pet. 20-22. They do not distinguish between entities whose "principal purpose . . . is the collection of any debts"—and therefore fit within the Act's first definition of "debt collector"—and those that, instead, "regularly collect[] or attempt[] to collect . . . debts owed or due or asserted to be owed or due another"—and therefore fit within the second definition of "debt collector." § 1692a(6). That conflation is significant because this case concerns only the second definition.

Moreover, there is good reason to believe that the first definition of "debt collector" sufficiently captures those entities that are likely to engage in the kind of malicious conduct that Petitioners conjure. The Act's legislative history makes clear that "[t]he primary persons intended to be covered are independent debt collectors" because they "are the prime source of egregious collection practices." S. Rep. No. 95-382, at 2-3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696-97. "Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696.

That legislative history does not describe full-service consumer-finance companies like Santander, not to mention large commercial banks like Capital One and Wells Fargo, the respective defendants in

Davidson and *Schlegel*. These companies are not one-off debt-collection agencies. They are conglomerate businesses whose standing in the community is critical to their success as lenders and loan servicers, among other things.[3]

The case law bears out these differing incentives. For instance, the Petition recites the ugly practices underlying *Check Investors* at length. Pet. 11-12 (detailing threats of arrest and other conduct). But *Check Investors* involved a company whose principal purpose was collecting debts, 502 F.3d at 172, 174, bringing it within the FDCPA's first definition of "debt collector." Likewise, the Petition dwells on assertions of appalling acts committed by a debt purchaser and its subsidiary. Pet. 20-21 (describing threats, harassment, offensive language, and misrepresentations). But those companies admitted that they were "debt collectors"—and likely fell within the first definition of that term. *See* Consent Decree, *United States v. Capital Acquisitions & Mgmt. Corp.*, No. 3:04-cv-50147 (N.D. Ill. Mar. 24, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/03/040324cag0223222.pdf.

Petitioners' second policy argument posits that the supposed circuit split "disserves" the debt-buying industry, "which finds itself subject to dramatically

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[3] Moreover, to the extent any such entity sought to avoid sullying its good name by hiding behind another, the third definition of "debt collector" in the FDCPA would apply. *See* § 1692a(6) (extending the definition of "debt collector" to any creditor who, "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts").

different federal requirements across a hodge-podge of states." Pet. 19. This argument rests on a faulty premise because there is no such split. And Petitioners do not speak for any industry of debt purchasers. In any event, such companies are already subject to a far wider variety of debt-collection legislation than spotty application of the FDCPA could ever entail. Many states enforce their own regulatory regimes, which may diverge significantly from the FDCPA. *See* 2 *Consumer Law Sales Practices and Credit Regulation* §§ 632, 674 (updated Sept. 2016) (discussing about a dozen "comprehensive" state laws regulating both creditors and debt collectors).

In short, this case does not present any issue of substantial national importance.

IV. The Fourth Circuit's decision below is correct.

The Fourth Circuit properly held that the second definition of "debt collector" in the FDCPA does not apply to a full-service consumer-finance company that purchases and then seeks to collect debt in default for its own account.

This is not a difficult case, for "there is no ambiguity in the words that Congress chose to employ." *Davidson*, 797 F.3d at 1316; *see also* Pet. App. 8a. The Act's second definition of "debt collector" covers any person that "regularly collects or attempts to collect . . . debts owed or due *another*." § 1692a(6) (emphasis added). It does not cover a company that collects debts owed or due *itself*. Petitioners do not seriously dispute that the loans at issue here were, at the time of Santander's collection efforts, owed or due Santander.

See Pet. 23. Nor could they. Thus, under the Act's plain text, Santander is not a debt collector.

At the same time, Santander does satisfy the equally plain definition of "creditor"—a person "who offers or extends credit creating a debt or *to whom a debt is owed.*" § 1692a(4) (emphasis added); *see* Pet. App. 14a.

Petitioners' counterarguments fail. First, they say, "owed or due . . . another" is ambiguous—and could mean "*at the time of origination*" just as much as "*at the time of collection.*" Pet. 24 (emphasis in original). That is not how the English language works. "[O]wed or due . . . another" describes debts that an entity "*collects* or *attempts* to collect"—present-tense verbs. § 1692a(6) (emphasis added). By way of analogy, when one says that "the librarian regularly collects books placed on the table," there is no question that "placed on the table" refers to the location of the books *at the time of collection* and not at some previous time. And the definition of "creditor" plainly references the present in covering any person "to whom a debt *is* owed." § 1692a(4) (emphasis added). There is no reason to think that the definition of "debt collector" would reference some other time.

Moreover, the legislative history states that "the term 'debt collector'" was meant "to cover all *third persons* who regularly collect debts *for others*," S. Rep. No. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697 (emphasis added)—not companies that

collect debts previously due others but now due themselves. *See* Pet. App. 11a-12a, 17a-18a.[4]

Second, Petitioners contend that the Act resolves the false ambiguity surrounding the meaning of "owed or due . . . another" by excluding from the definition of "debt collector" any person "collecting or attempting to collect any debt . . . owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." § 1692a(6)(F)(iii). This exclusion, Petitioners contend, shows by "necessary implication" that "assignees of defaulted debt are otherwise included as 'debt collectors' under the provision's main definition." Pet. 24-25.

That theory is too clever by half. It improperly elevates a negative inference from a definitional exclusion over the definition itself. As the Eleventh Circuit explained, "this argument is not persuasive because § 1692a(6)(F)'s exclusions do not obviate the substantive requirements of § 1692a(6)'s definition."

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[4] Here, Petitioners decline to repeat an argument they made below—that "another" attaches only to debts "asserted to be owed or due," not to debts "owed or due." *See* Pet. App. 28a-29a. The Fourth Circuit correctly rejected that argument, Pet. App. 17a, on the ground that "[w]hen [multiple] words are followed by a clause which is applicable as much to the first . . . as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014). Indeed, the Supreme Court has expressly attached "another" to debts "owed." *Heintz v. Jenkins*, 514 U.S. 291, 293 (1995) ("The Act's definition of the term 'debt collector' includes a person 'who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another." (alterations in original)).

Davidson, 797 F.3d at 1314. If Santander does not meet the threshold definition of "debt collector," the exclusions from that term are irrelevant. *See* Pet. App. 14a-15a.

Moreover, this argument equates one who "obtain[s]" debt in default with one who owns such debt outright. Obtainment, however, can denote mere possession, not ownership. *See Black's Law Dictionary* 1247 (10th ed. 2014) (defining "obtain" as "[t]o bring into one's own possession").

Here, we know that Congress intended that this exclusion apply to "mortgage service companies and others who service outstanding debts for others"—that is, entities that do not own the underlying obligations—"so long as the debts were not in default when taken for servicing"—that is, when obtained. S. Rep. No. 95-382, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698; *see* Pet. App. 14a-15a. Because this exclusion encompasses other parties, there is no reason to conclude that debt purchasers must fit within the Act's main definition. Petitioners' "necessary implication" is not necessary at all.

Third, Petitioners observe that the exclusion from the definition of "debt collector" in § 1692a(6)(F)(iii) is "roughly parallel" to the assignee exclusion from the definition of "creditor" in § 1692a(4). Pet. 25. They thus argue that the provisions should "work in tandem" by turning on the default status of debt at the time of acquisition. Pet. 25-26. "[O]ne who collects a debt obtained before it went into default is a creditor, not a debt collector; one who obtains the debt

after default is a debt collector, not a creditor," Petitioners say. Pet. 26.

This forced simplicity mangles the text of the FDCPA. In addition to rewriting the phrase "owed or due . . . another" in both the definition of "debt collector" at § 1692a(6) and the exclusions at § 1692a(6)(F), Petitioners' interpretation negates the assignee exclusion's explicit limitation to debt acquired "solely for the purpose of facilitating collection of such debt for another," § 1692a(4). That cannot be correct.

Moreover, the provisions can work in tandem without forcing an unnatural reading on the FDCPA. The assignee exclusion from the definition of "creditor" appears to refer to mortgage servicers and similar entities, just like the § 1692a(6)(F)(iii) exclusion. A mortgage servicer, after all, could fit within the definition of "creditor" because one could say that a debt is "owed" to the entity to whom he writes a check each month. § 1692a(4). Under this interpretation, the Act provides that, except for servicing companies, one who collects a debt owed himself is a creditor, whereas one who collects a debt owed another is a debt collector. For servicing companies, which occupy a gray area between creditors and debt collectors, the distinction turns on the default status of debt at the time of acquisition.

Finally, Petitioners cite recent statements by the FTC and CFPB. But any agency interpretation contrary to the decision below would be inconsistent with the FDCPA's unambiguous language and would thus not warrant deference. *See Chevron, U.S.A., Inc.*

v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Moreover, given the coming change in administrations, it is unclear whether the agencies will retain the same positions.

In sum, Petitioners point to no lower-court conflict that this Court needs to correct, and this case would provide a poor vehicle for addressing the question presented anyway. No issue of substantial national importance is at stake. And the decision below is correct.

CONCLUSION

For the forgoing reasons, this Court should deny the Petition.

Respectfully submitted,

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